

2/22/01

**THIS DISPOSITION
IS NOT CITABLE AS PRECEDENT
OF THE T.T.A.B.**

Hearing:
October 17, 2000

Paper No. 019
EWH/cv

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Swearingen Software, Inc.

Serial No. 75/365,334

Al Harrison of Harrison & Egbert for Swearingen Software,
Inc.

Esther Borsuk, Trademark Examining Attorney, Law Office 113
(Meryl Hershkowitz, Managing Attorney).

Before Hanak, Hohein and Bucher, Administrative Trademark
Judges.

Opinion by Hanak, Administrative Trademark Judge:

Swearingen Software, Inc. (applicant) seeks to
register RMS in typed drawing form for "computer programs
for radiology information systems, namely, software for
patient management, film tracking, scheduling,
transcription, inventory, quality control, standard

procedures, equipment maintenance, and personnel management of X-ray departments of small-to-medium-sized healthcare facilities including clinics and hospitals." The application was filed on September 30, 1997 with a claimed first use date of June 1986.

Citing Section 2(d) of the Trademark Act, the Examining Attorney has refused registration on the basis that the applicant's mark, has applied to applicant's goods, is likely to cause confusion with the identical mark RMS, previously registered for "computer programs in the form of prerecorded magnetic tape and computer user's manuals sold as a unit." Registration No. 1,315,475. This registration issued on January 22, 1985 with a claimed first use date of August 1980.

When the refusal to register was made final, applicant appealed to this Board. Applicant and the Examining Attorney filed briefs. An oral hearing was held on October 17, 2000 at which counsel for applicant was present. However, neither the Examining Attorney nor any other representative from the PTO was present at the hearing.

In any likelihood of confusion analysis, two key, although by no means exclusive, considerations are the similarities of the marks and the similarities of the goods

and/or services. Federated Foods, Inc. v. Fort Howard Paper, Co. 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

Turning to a consideration of the marks, as noted above, they are identical. However, RMS is often not an arbitrary string of letters. We see this in a number of third-party registrations that the applicant has made of record. The initialism "rms" readily suggests "Root Mean Square" to those who are knowledgeable about sine waves and their mathematical application to audio inputs,¹ electronics² and television signals.³ In the context of these particular goods, the designation generates the idea of an attribute of the goods and hence must be viewed as suggestive for such goods. Other third-party registrations containing the RMS designation, like applicant's suggestion of radiology management systems, suggest other specialized software applications like records management systems⁴ or even restaurant management systems.⁵ Hence, inasmuch as a number of third parties adopted the term RMS with different suggestive connotations, users of computer software and

¹ RMS and design for guitar amps and speakers (Reg. No. 1,697,398).

² RMS and square root design for electronic controls (Reg. No. 1,405,569).

³ RMS for TV antennas (Reg. No. 870,387).

⁴ RECORDS MANAGEMENT SYSTEM/2000 RMS/2000 for software for municipalities (Reg. No. 1,764,134).

⁵ RMS-TOUCH for restaurant software (Reg. No. 1,894,952).

high tech equipment will tend to view this initialism as a relatively weak source identifier.

Turning to a consideration of the goods, registrant's goods, as previously noted, are broadly described as "computer programs in the form of prerecorded magnetic tape and computer user's manuals sold as a unit." This identification of goods is broad enough to arguably encompassed applicant's computer programs for radiology information systems.

However, our likelihood of confusion analysis does not end here. Applicant has established through the declaration of its president that applicant's computer programs, as described in its application, are inherently expensive; are sold only to sophisticated purchasers (hospitals and clinics); and are sold only after a considerable amount of discussion and negotiation between applicant and the purchaser. The Examining Attorney has in no way challenged applicant's evidence regarding the nature of its goods, as described in its application, in terms of cost; purchaser sophistication; and conditions of sale. See Examining Attorney's brief page 6.

Considering the cost of the goods as described in applicant's application, it is obvious that "confusion is less likely where goods are expensive." Magnaflux Corp. v.

Sonoflex Corp., 231 F.2d 669, 109 USPQ 313, 315 (CCPA 1956). See also Weiss Associates Inc. v. HRL Associates Inc., 902 F.2d 1546, 14 USPQ2d 1840, 1841 (Fed. Cir. 1990).

Considering next the fact that applicant's goods, as described in its application, are purchased only by sophisticated purchasers, it should be noted that our primarily reviewing Court has made it clear that purchaser "sophistication is important and often dispositive because sophisticated consumers may be expected to exercise greater care." Electronic Design & Sales v. Electronic Data Systems, 954 F.2d 713, 21 USPQ2d 1388, 1392 (Fed. Cir. 1992).

Moreover, as for undisputed fact that applicant's goods, as described in its application, are purchased only after significant discussion and negotiation, our primarily reviewing Court has explicitly stated that this is yet another fact in reducing the likelihood of confusion. Electronic Design & Sales, 21 USPQ 2d at 1392.

Finally, applicant has established by means of the declaration of its president that from the time applicant first used its mark RMS in 1986 to the present "there have been no incidences of there being any confusion between [applicant's] RMS product and any other product marketed under a RMS trademark." (Swearingen declaration paragraph

5). As previously noted, registrant has claimed that it first used its mark in 1980. Thus, while we do not know what registrant's experience has been, the record shows that applicant has encountered no instances of actual confusion involving applicant's highly specialized RMS computer programs for radiology information systems and registrant's RMS pre-recorded computer programs. In response, the Examining Attorney merely notes that proof of actual confusion is not a prerequisite to a finding of likelihood of confusion.

On this latter point, the Examining Attorney is correct. However, the fact that during a time period of 14 years applicant has experienced no known instances of actual confusion is some slight evidence in support of finding that there is no likelihood of confusion. Cf. In re General Motors Corp., 23 USPQ2d 1465, 1470-71 (TTAB 1992). However, we wish to emphasize that the facts surrounding the absence of actual confusion in this case are not nearly as dramatic as those that existed in General Motors, and that we have accorded only very minimal weight to this absence of actual confusion in determining whether there exists a likelihood of confusion.

In sum, given the fact that the letters RMS are not arbitrary but rather have various meanings as applied to a

variety of specialized computer programs and related goods, and the fact that applicant's computer programs, as described in its application, are inherently expensive, are purchased by sophisticated individuals and are purchased only after extensive discussion and negotiation with the manufacturer, we find there exists no likelihood of confusion.

Decision: The refusal to register is reversed.